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In The

Supreme Court of the United States

October Term, 1977

No. 77-728

THE SCHOOL DISTRICT OF OMAHA,
STATE OF NEBRASKA, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,
and
NELLIE MAE WEBB, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Petitioners, the School District of Omaha, Owen A. Knutzen, Superintendent of Schools, and the members of the Board of Education of the School District of Omaha, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on October 21, 1977.

OPINIONS BELOW

The October 21, 1977, Court of Appeals opinion on remand, not yet reported, appears in the separate Appendix hereto at pages 175 to 178. The Court of Appeals opinion on the remedy is reported at 541 F. 2d 708 (8th Cir. 1976) and appears in the separate Appendix at pages 172 to 175. The District Court opinion on the motion for new trial on the plan, not yet reported, appears in the separate Appendix at pages 165 to 169. The District Court opinion approving the plan for desegregation is reported at 418 F. Supp. 22 (D. Neb. 1976) and appears in the separate Appendix at pages 139 to 145. The opinion of the Court of Appeals on the issue of liability is reported at 521 F. 2d 530 (8th Cir. 1975) and appears in the separate Appendix at pages 100 to 133. The opinion on liability issued by the District Court is reported at 389 F. Supp. 293 (D. Neb. 1974) and appears in the separate Appendix at pages 41 to 98. The opinion on the motion to intervene issued by the District Court is reported at 367 F. Supp. 198 (D. Neb. 1973) and appears in the separate Appendix at pages 34 to 40. The District Court opinion on the motion for a preliminary injunction is reported at 367 F. Supp. 179 (D. Neb. 1973) and appears in the separate Appendix at pages 1 to 33.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit on remand from this Court was entered on October 21, 1977, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

1. Under *Village of Arlington Heights,* does mere proof that one of the "natural and foreseeable" effects of school district acts or omissions was to "create or maintain" racially imbalanced schools compel a finding of segregative intent?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions involved in the resolution of this matter are set forth in the Appendix attached to this Petition: (1) The Fourteenth Amendment to the United States Constitution, Section 1; (2) 42 U. S. C. Section 2000c-6; (3) 42 U. S. C. Section 1983.

STATEMENT OF THE CASE

On June 29, 1977, this Court vacated the prior decisions of the United States Court of Appeals for the Eighth Circuit in this case and ordered reconsideration in light of *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U. S. 252 (1977), and *Dayton Board of Education v. Brinkman,* — U. S. —, 97 S. Ct. 2766 (1977). *School District of Omaha v. United States,* — U. S. —, 97 S. Ct. 2905 (1977). The Court of Appeals entered its opinion on remand on October 21,

1977. — F. 2d — (8th Cir. 1977). This petition is filed because the Court of Appeals did not properly undertake the reconsideration ordered by this Court.

This Court has twice before considered this case, Nos. 75-270 and 76-705.

The litigation was instituted on August 10, 1973, in the District Court for the District of Nebraska by the United States of America under 42 U. S. C. Section 2000c-6(a). The United States contended that the School District of Omaha, its Superintendent, and the members of its Board of Education (hereinafter collectively referred to as the "School District") engaged in racial discrimination in the operation of the Omaha Public School System in violation of Title IV of the Civil Rights Act of 1964 and the Fourteenth Amendment to the Constitution of the United States. Several black students and their parents were allowed to intervene pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure. They asserted a similar claim for deprivation of their right to equal protection of the laws under 42 U. S. C. Section 1983, and the Fourteenth Amendment to the United States Constitution. (The United States and the Intervenors are hereinafter collectively referred to as the "Plaintiffs".)

For the 1973-74 school year (the last school year for which there is evidence in the record), the School District of Omaha had a total enrollment of 60,502 students. The boundaries of the School District of Omaha are not coterminous with those of the City of Omaha. Substantial portions of the City are within School District No. 66 and the Millard School District, both of whose enrollments are almost totally white. Segregation of the races within the

boundaries of the School District of Omaha or the City of Omaha has never been mandated by any statute or by any local regulation, policy or ordinance. The basic method of student assignment is, and always has been, the neighborhood school policy.

There has been a rapid expansion of the black population of Omaha. In 1950, the black population was 16,311 (6.5% of the total population), and in 1970, it was 34,431 (9.9% of the total population). During each of the years from 1950 to 1970, the black birth rate substantially exceeded the white birth rate. From 1950 to 1973, the total black enrollment in the School District of Omaha grew from 2,862 to 11,962, an increase of 318%, and the black percentage of the total enrollment increased from 10% to 20%.

The black population resides primarily in one geographic area of the City, and this concentration is reflected in the racial enrollments of the neighborhood schools serving that area. Despite this concentration, for the 1973-74 school year, 40.6% of the black students attended majority white schools, and 85.9% of all schools had some black enrollment.

The liability phase of this litigation focused on certain aspects of the School District's neighborhood school policy, and on whether the racial imbalance present in the school system was intentionally caused or maintained by the School District. Following the pattern of other school desegregation cases, the Plaintiffs alleged intentional racial discrimination in: (1) the hiring of faculty; (2) the placement of portable classrooms within the District; (3) the alteration of school attendance boundaries; (4) the

assignment of black faculty; (5) the adoption of an open transfer policy for students; (6) the adoption of certain feeder patterns for junior high schools; (7) the construction of schools; and (8) the condition of one particular school, Technical High School.

After a two-and-one-half week trial, the District Court issued an opinion dismissing the action and holding, based on all of the evidence before it from the trial and from the hearing on the United States' motion for a preliminary injunction, that:

> " . . . this record simply does not justify the finding and determination that the school authorities in question intentionally discriminated against minority students by practicing a deliberate policy of racial segregation." (App. p. 97).

The District Court arrived at its conclusion by applying the legal standard which this Court enunciated in *Keyes v. School District No. 1,* 413 U.S. 189 (1973), and which, as applied by the District Court, is substantially consistent with the principles announced in *Washington v. Davis,* 426 U.S. 229 (1976), and *Village of Arlington Heights.* First, the District Court held that the burden of proof was on the Plaintiffs to show that an intentionally segregative policy was practiced in a meaningful or significant portion of the school system. Second, it recognized that once the Plaintiffs had borne their burden of proof on purpose to segregate with respect to a meaningful portion of the school system, the burden of proof shifted to the School District to show that its actions as to any of the other segregated schools within the school system were not motivated by purpose or intent to segregate. Third, it recognized that intent or purpose to segregate must in most cases be inferred from the objective actions of the school authorities. Fourth, it held that the natural and foreseeable consequences of the School District's actions were neither determinative nor immaterial, but rather constituted an additional factor to be weighed in evaluating its overall intent (App. pp. 43-44).

On appeal, the Court of Appeals reversed the District Court. While ostensibly agreeing with this Court in *Keyes* and with the District Court that school desegregation may not be ordered by a federal court unless there is a finding that segregation was brought about or maintained by intentional state action, the Court of Appeals held that the District Court erred as a matter of law in its legal standard for determining segregative intent.[1] The Court of Appeals held that the plaintiff in a school desegregation case need only prove that racial imbalance exists in the schools and was the natural, probable and foreseeable consequence of school district action or inaction. The plaintiff need not prove purpose or intent to segregate by the defendant. Under the Court of Appeals' standard, mere proof of racial separation effects creates a presumption of purpose to segregate and shifts the burden of proof to the school authorities to establish that segregative intent was not among the factors that motivated their actions regarding any of the racial imbalance in the schools (App. pp. 107-108).

The Court of Appeals held that, as to five of the eight policy areas challenged at trial, the foreseeable conse-

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1. It is this conflict between the District Court and the Court of Appeals as to the proper standard for determining segregative intent that still remains unresolved in this case and is the sole subject of this petition.

quence of School District acts and omissions was to create or maintain racially imbalanced schools and therefore the School District was presumed to have a racially discriminatory purpose. The Court of Appeals concluded that the School District had failed to rebut the presumption by carrying its burden of establishing that segregative intent was not among the factors motivating its actions.

The five areas where the Court of Appeals found racial separation attributable to actions of the School District were: (1) the assignment of black faculty to already black schools; (2) the open transfer policy initiated upon the recommendation of the Mayor of Omaha's bi-racial committee; (3) elementary feeder patterns for Horace Mann Junior High School and for Technical Junior High School, which was closed a year before this litigation commenced; (4) neighborhood school construction; and (5) the condition of Technical High School.

The Court of Appeals applied its standard to School District policies in each of these areas, and based upon that standard, and that standard alone, found a violation of the Fourteenth Amendment. The Court of Appeals did not review the District Court's findings under Rule 52(a) of the Federal Rules of Civil Procedure. Thus, the Court of Appeals did not hold that the District Court's findings were "clearly erroneous" under the legal standard employed by the District Court.

In addition to reversing the District Court on liability, the Court of Appeals also ordered full integration of the entire School District of Omaha no later than the beginning of the 1976-77 school year, according to certain

racial balance remedy guidelines developed sua sponte by the Court of Appeals. These guidelines called for a systemwide alteration of assignment policies and required the bussing of substantial numbers of students. Only the mechanical details of the plan were left to the School District and the District Court to work out.

Thereafter, the School District filed a petition for a writ of certiorari with this Court, No. 75-270, seeking a reversal of the Court of Appeals' decision. That petition presented two questions to this Court. First, whether the Court of Appeals had utilized an improper standard for determining purpose or intent to segregate. Second, whether the remedy guidelines of the Court of Appeals were improperly issued at that stage of the litigation, without any opportunity for the parties to submit evidence or argument on the appropriate remedy. This Court denied the School District's petition. 423 U. S. 946 (1975).

Following the denial of its petition for a writ of certiorari, the School District prepared a plan for desegregating its schools according to the dictates of the racial percentage guidelines established by the Court of Appeals. That plan, with certain modifications suggested by the Plaintiff United States, was adopted by the District Court (App. pp. 139-65).

The Plaintiff-Intervenors and the School District both appealed the District Court's order approving the plan. The School District raised before the Court of Appeals the issue of the propriety of the remedy guidelines and also the issue of the propriety of the Court of Appeals' standard for determining intentional segregation. The Court of Appeals, en banc, entered a per curiam opinion

affirming the District Court's plan (App. pp. 172-75). The plan (App. pp. 147-65) requiring reassignment of over 10,000 students went into effect on September 7, 1976, and has remained in effect since that date.

On November 19, 1976, the School District petitioned this Court for a writ of certiorari to review the decisions of the Court of Appeals on the proper standard for determining intent to segregate and on the propriety of the remedy imposed by the Court of Appeals, No. 76-705. On June 29, 1977, this Court granted the School District's petition for a writ of certiorari on both issues and remanded this case to the Court of Appeals. — U. S. —, 97 S. Ct. 2905 (1977).

On October 21, 1977, the Court of Appeals affirmed its prior holding that the School District of Omaha had engaged in intentional segregation and remanded this case to the District Court for reconsideration of the appropriate remedy in light of *Dayton Board of Education v. Brinkman* (App. pp. 175-78). In its October 21, 1977, opinion on remand, the Court of Appeals did not review under *Village of Arlington Heights* the original finding of the District Court that the School District acted without segregative intent, although the findings of the District Court were thoroughly briefed in light of *Village of Arlington Heights* and Rule 52(a) of the Federal Rules of Civil Procedure. Rather, the Court of Appeals held that the foreseeable effects standard utilized in its original liability opinion of June 12, 1975 (App. pp. 105-110) for ascertaining intentional discrimination in school desegregation cases was consistent with the rule of law announced in *Village of Arlington Heights*, in effect stating its agreement with Mr. Justice Brennan's dissent in this Court's June 29, 1977, opinion in this case. Since it had previously reviewed the findings of the District Court under the foreseeable effects standard, the Court of Appeals did not review the facts again in its opinion on remand. Nor did the Court of Appeals reassess the propriety of the standard for determining segregative intent utilized by the District Court in light of *Village of Arlington Heights*. Apparently, the Court of Appeals persisted in its prior opinion that the District Court's standard was erroneous as a matter of law, and that, therefore, review under Rule 52(a) was unnecessary.

Therefore, this case, in its current posture, clearly presents for this Court the critical issue of the appropriate standard for determining purpose to segregate in school districts where racial separation in the schools has never been officially mandated by law.

REASONS FOR GRANTING THE WRIT

This school desegregation case, like other such cases, was decided under the Equal Protection Clause of the Fourteenth Amendment. Interpretation of this Amendment has also recently been the focus of litigation involving allegations of racial discrimination in other areas, such as housing and employment. Some of the lower federal courts, when presented with such allegations, developed an interpretation of the Fourteenth Amendment which permitted a finding of unconstitutional action upon a showing that the challenged action had a racially dis-

proportionate effect. No inquiry into the reasons why the public body engaged in the action was necessary. Most of the lower federal courts, and specifically the Eighth Circuit, developed a parallel interpretation of the Amendment for application to northern school desegregation cases. Any school policy which had the foreseeable effect of racial imbalance in the schools violated the Fourteenth Amendment.

This Court has recently disapproved this disproportionate impact interpretation of the Fourteenth Amendment in cases involving alleged discrimination in housing[2] and employment.[3] Proof of racially disproportionate impact does not, except in extreme cases, make out a violation of the Fourteenth Amendment. This Court rejected the disproportionate impact standard because it realized that such an interpretation of the Fourteenth Amendment would involve the courts in reviewing and invalidating "a whole range of tax, welfare, public service, regulatory, and licensing statutes" solely on the ground that they were "more burdensome to the poor and to the average black than to the more affluent white." *Washington v. Davis*, 426 U. S. at 248. The Fourteenth Amendment simply does not warrant such an intrusion by the courts into areas of decision-making traditionally reserved to the political branches of the government. Such judicial scrutiny and invalidation is appropriate under the Fourteenth Amendment only when actions are taken with a purpose to discriminate on the basis of race.

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2. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977).

3. *Washington v. Davis*, 426 U. S. 229 (1976).

This Court's rejection of the disproportionate impact theory of the Fourteenth Amendment, however, has not been followed by the lower federal courts in school desegregation cases. The Eighth Circuit in this case and the Sixth Circuit in *N. A. A. C. P. v. Lansing Board of Education*, 559 F. 2d 1042 (6th Cir. 1977), *petition for cert. filed*, 46 U. S. L. W. 3307 (U. S. Oct. 20, 1977) (No. 77-600), continue to hold that the Fourteenth Amendment is violated by any official decision which has the foreseeable effect of racial imbalance in the schools. This Court's disapproval of the disproportionate impact theory of the Fourteenth Amendment in analogous cases has been insufficient to achieve a sound application of the Amendment in subsequent school desegregation cases.

This refusal by the Eighth and Sixth Circuits to properly apply the Fourteenth Amendment is particularly disconcerting in the light of this Court's unequivocal position that the fact that "there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause."[4] Despite this clear declaration of constitutional policy, these Circuits continue to use a standard of law which compels a finding that racially identifiable schools are prohibited by the Fourteenth Amendment.

There is but one Fourteenth Amendment, and this Court must, in this case, insist that the Amendment be uniformly applied to all cases arising under it, including school desegregation cases.

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4. *Washington v. Davis*, 426 U. S. at 240. See also, *Dayton Board of Education v. Brinkman*, — U. S. at —, 97 S. Ct. at 2774.

I. The Standard Relied on by the Court of Appeals in Upholding its Finding of Segregative Intent is in Clear Conflict with Village of Arlington Heights v. Metropolitan Housing Authority, 429 U. S. 252 (1977).

The sole question presented by this petition for a writ of certiorari is whether the Court of Appeals for the Eighth Circuit was correct on remand in determining that the plaintiff in a school desegregation case meets its burden of proof under *Village of Arlington Heights* simply by showing that one of the "natural and foreseeable" effects of the actions of the School District was to "create or maintain segregation."

A. The Conflict in Theory.

1. The Foreseeable Effects Standard.

The foreseeable effects standard employed by the Court of Appeals in this case has been a determining factor in school desegregation litigation in the Circuit Courts for at least the last four years.[5] This standard was engrafted into constitutional adjudication from the principle of the law of torts that an actor intends the natural consequences of his actions. The standard, as employed by the Court of Appeals here, may be summarized as having the following elements:

(a) The plaintiff in a school desegregation case must show that racial imbalance in the schools was a

5. See, e. g., *Hart v. The Community School Board of Education, New York School District No. 21*, 512 F. 2d 37, 51 (2nd Cir. 1975); *United States v. Texas Education Agency*, 532 F. 2d 380 (5th Cir. 1976); *Oliver v. Michigan State Board of Education*, 508 F. 2d 178 (6th Cir. 1974).

natural and foreseeable effect of action or inaction by the school district;

(b) Proof that racial imbalance was a natural and foreseeable effect of school district action or inaction always completely meets the burden of proof placed on plaintiffs in school desegregation cases; and

(c) Once the plaintiff has shown that racial imbalance was such a foreseeable effect, the school district must show that segregative intent was not among the factors motivating the action or inaction in question.

2. The Village of Arlington Heights Standard.

In marked contrast, this Court in *Village of Arlington Heights* developed the following method of assessing claims of racial discrimination under the Fourteenth Amendment:

(a) The plaintiff must show that a discriminatory purpose was a motivating factor in the defendant's actions;

(b) Proof of racial separation effects or racially disproportionate effects alone does not normally meet the burden of proof placed on the plaintiff. It does so only where there is a stark pattern of such effects for which there is no reasonable explanation other than an invidious discriminatory purpose. Absent such a pattern, the plaintiff must attempt to show intent by introducing evidence concerning such matters as the historical background of the action taken, the specific sequence of events leading up to the challenged decision, any departures from normal procedural sequence or substantive policy, or the

legislative or administrative history of the actions taken; and

(c) After the plaintiff shows that racial discrimination was a purpose motivating the defendant, the defendant may still prevail by showing that the same action would have been taken even if the impermissible racial purpose had not been considered.

3. The Clear Inconsistency.

The Court of Appeals' standard is inconsistent with the standard announced by this Court in *Village of Arlington Heights* for four reasons:

(a) The Court of Appeals' standard permits a finding of intentional segregation solely from racial separation effects in circumstances where those racial separation effects are not even remotely analogous to the unequivocal pattern of racially disproportionate effects unmistakably evidencing a covert discriminatory purpose such as was present in *Gomillion v. Lightfoot,* 364 U.S. 339 (1960), or *Yick Wo v. Hopkins,* 118 U.S. 356 (1886);

(b) It prematurely shifts the burden of proof with respect to intent to the defendant, thereby relieving from the plaintiff and placing on the defendant the obligation of producing evidence concerning such matters as the historical background of the action taken, the specific sequence of events leading up to the challenged decision and the like;

(c) It conclusively presumes a constitutional violation in that, once it is demonstrated that segregative intent was a purpose motivating the defendant's actions,

it does not permit the defendant to avoid a finding of liability by showing that the action complained of would have been taken even if race had not been a purpose motivating the action; and

(d) More fundamentally, the Court of Appeals' standard does not vest discretion in the trier of fact to evaluate all relevant evidence bearing on the question of discriminatory purpose as does *Village of Arlington Heights,* but rather from only one kind of evidence, that of segregative effects, the Court of Appeals' standard compels a finding of segregative intent as a matter of law.

Thus, in four critical respects, the standard reasserted by the Court of Appeals in its opinion on remand is clearly inconsistent with the law of *Village of Arlington Heights,* in light of which this Court ordered reconsideration.

B. The Conflict in Practice.

1. The Foreseeable Effects Standard Requires Results Contrary to Those Reached in Washington v. Davis and Village of Arlington Heights.

If the foreseeable effects standard properly states the law developed by this Court in *Washington v. Davis* and *Village of Arlington Heights,* application of that standard to the facts in those cases should produce a conclusion identical to the one reached by this Court. If, on the other hand, application of the foreseeable effects standard leads to conclusions contradictory to those reached by this Court in those cases, the foreseeable effects standard cannot be a proper interpretation of the

Fourteenth Amendment. Since application of the foreseeable effects standard to the facts in these cases produces contrary results, that standard is not consistent with this Court's interpretation of the Fourteenth Amendment.

One of the foreseeable effects of the examination challenged in *Washington v. Davis* was that a higher percentage of blacks than whites would not qualify for police work. Yet this did not create a presumption that the examination was used for an invidious discriminatory purpose and shift the burden of proof to the City to show that it was not acting with discriminatory intent in utilizing the examination. Likewise, one of the foreseeable effects of the denial of the rezoning challenged in *Village of Arlington Heights* was to lessen housing opportunities for blacks in the Village. But this did not cause the rezoning denial to be considered presumptively illegal and shift the burden to the Village to show that it was not acting with segregative intent in denying the rezoning. In either case it is apparent that, if the foreseeable effects standard had been applied, radically different burdens of proof would have been placed on the defendants and thus, given the difficulty of meeting such a burden, the conclusion on discriminatory intent would have been opposite to the one reached by this Court.

Therefore, the foreseeable effects standard is patently inconsistent with this Court's reassertion of the law in *Washington v. Davis* and *Village of Arlington Heights* that the Fourteenth Amendment prohibits state action taken with a racially discriminatory purpose, and not mere state action with racially disproportionate results.

2. The Foreseeable Effects Standard Logically Implies a Constitutional Duty to Eliminate Racially Identifiable Schools.

This Court has unequivocally established that the existence of predominantly black schools and predominantly white schools in racially mixed communities does not offend the Constitution.[6] There is no Fourteenth Amendment obligation to integrate the public schools. Racially identifiable schools are prohibited only if they are the intended result of school district actions. This Court has asserted this principle repeatedly, thus firmly indicating that it has practical significance.

The foreseeable effects standard, on the other hand, clearly implies that racially identifiable schools do offend the Constitution and that the Fourteenth Amendment imposes an affirmative obligation to integrate. In particular, it prohibits a neighborhood school assignment policy in school districts with racially imbalanced neighborhoods. This consequence of the foreseeable effects standard is apparent for the following reasons.

First, the presumption of segregative intent will be readily invoked since it is clear that any such school district maintains the neighborhood school policy with the conscious knowledge that it produces racially imbalanced schools. Thus, all the plaintiff need show is that the school district employs a neighborhood school assignment policy and has residentially racially imbalanced neighborhoods. This showing alone makes out a prima facie case.

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6. *Dayton Board of Education v. Brinkman*, — U. S. at —, 97 S. Ct. at 2774.

Second, once the prima facie case is made out, the burden then shifts to the school district to show that intent to segregate was not among the factors motivating its use of the neighborhood school policy.

But the school district is here faced with an impossible task.[7] By definition, the foreseeable effects standard requires a finding of intent upon a showing that a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow. Obviously, a reasonable man in the school district's position would believe that racial imbalance was substantially certain to occur in the schools of a school district employing a neighborhood assignment policy, whose neighborhoods were residentially racially imbalanced. Although there might be other foreseeable consequences flowing from a neighborhood school assignment policy, one of

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7. The conclusive character of the Eighth Circuit's presumption in this case has been recognized:

> "Occasionally, the fiction is phrased in terms of a presumption of segregative design, which a school board can rebut only by proving that its challenged action, creating racially imbalanced schools, was not racially motivated. United States v. School Dist., 521 F. 2d 530, 535-36 (8th Cir.), *cert. denied*, 96 S. Ct. 361 (1975) ("[A] presumption of segregative intent arises once it is established that school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to bring about or maintain segregation."); Oliver v. State Bd. of Educ., 508 F. 2d 178, 182 (6th Cir. 1974). Given the extraordinary difficulty of establishing the absence of racial motivation, the presumption of segregative design is, for practical purposes, the equivalent of a conclusive presumption."

Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. Pa. L. Rev. 540, 579 n. 167 (1977).

those foreseeable consequences is always going to be racial imbalance. Thus, under the foreseeable effects standard, at least one of the purposes behind maintaining the neighborhood school policy is r a c i a l l y imbalanced schools. The school district will not be able to demonstrate that none of the factors motivating its action was intent to separate on the basis of race. Therefore, unless the school district abandons the neighborhood school assignment policy, it will be in violation of the Fourteenth Amendment. Racial balance becomes a constitutional imperative.

Clearly, such a conclusion is inconsistent with *Washington v. Davis, Village of Arlington Heights,* and *Dayton Board of Education v. Brinkman.* Since this conclusion is reached by a reasonable and consistent application of the standard utilized by the Court of Appeals, that standard must be rejected.

This Court has well defined the appropriate method for determining discriminatory purpose in *Village of Arlington Heights.* The School District does not here urge any different methodology in school desegregation cases. Certiorari should be granted not to establish any new method, but to make clear to the lower federal courts that the methodology developed in *Village of Arlington Heights* applies to school desegregation cases and that the foreseeable effects standard is inappropriate for ascertaining segregative intent in such cases.

Uniform application of the Fourteenth Amendment requires that this Court speak directly on the meaning of that Amendment in a school desegregation case. This case presents, in as clear a form as possible, this vital

issue of the appropriate standard for determining segregative intent in school desegregation cases. This Court should grant the petition and reverse the Court of Appeals.[8]

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8. The incongruity between the Court's recent re-examination of the meaning of discriminatory purpose under the Fourteenth Amendment and the foreseeable effects standard has been clearly recognized in two recent comprehensive law review articles on the subject. Perry, supra note 7; Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N. Y. U. L. Rev. 36 (1977). Professor Perry is particularly insightful concerning this incongruity:

> "Several federal courts of appeals, laboring under the Supreme Court's de jure-de facto distinction but persuaded that a disproportionate impact test should govern school desegregation suits, have resorted to a fiction that enables the lower courts to cast their opinions in terms of 'intent' and 'de jure' segregation even though they focus not on discriminatory purpose but on effects, in terms of racial balance. The courts' theory is that school boards 'intend' the natural, foreseeable consequences of their actions. Under this theory, if a school board's action has the effect — which will always be 'natural' and 'foreseeable' because it is no secret which neighborhoods are predominantly black and which are not—of creating or maintaining racially imbalanced schools, then the school board is said to 'intend' the effect and thus to create 'de jure' segregation.
>
> "The theory is a fiction. It rests on a bastardization of the concept of intent. The 'discriminatory purpose' or 'intent' that the Supreme Court has invariably required as an element of unconstitutional racial discrimination is the deliberate use of race as a criterion of selection. This is intent as motivation. The intent on which the lower courts rely does not denote the deliberate use of a racial criterion but consists of foreknowledge of result. This is intent as knowledge; whether or not the result was desired is simply not relevant. The intent fiction effectively collapses the distinction between de jure and de facto segregation. Under the fiction, the use of the neighbor-

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II. There is a Conflict in the Courts of Appeals on the Proper Standard for Ascertaining Segregative Intent.

In each of its prior two petitions for a writ of certiorari, the School District has apprised this Court of the conflict in the Circuits concerning the proper standard for determining segregative intent in school desegregation cases.[9] That conflict is still present today and has not been resolved by this Court's decisions in *Washington v. Davis* and *Village of Arlington Heights* since subsequent to these decisions the Eighth Circuit in this case and the Sixth Circuit in *N.A.A.C.P. v. Lansing Board of Education, supra,* have continued to assert the validity of the foreseeable effects standard in school desegregation litigation. To date, no other circuit courts have decided questions of segregative intent in school desegregation cases since *Village of Arlington Heights.*

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> hood criterion of selection, when it naturally and foreseeably leads to racially imbalanced neighborhood schools, constitutes de jure segregation even though such schools have always been regarded as 'segregated' only in a de facto or adventitious sense. Use of the intent fiction is simply a mask for application of the disproportionate impact theory of racial discrimination to school desegregation cases. It is difficult to perceive any principled basis on which the Supreme Court can accept the intent fiction in the context of school desegregation while rejecting DRI [disproportionate racial impact] theory, which the fiction masks, in every other context." Perry, *supra* note 7, at 579-80.

9. The presence and significance of this conflict in the Circuits has been noted recently by various commentators: Note, *Intent to Segregate: The Omaha Presumption,* 44 Geo. Wash. L. Rev. 775, 796 n. 153, 803 (1976); Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction,* 86 Yale L. J. 317 (1976); Perry, *supra* note 7, at 555 n. 88; Eisenberg, *supra* note 8, at 50 n. 76.

However, in clear contrast to the Eighth and Sixth Circuits, the Ninth Circuit has consistently employed a standard similar to that subsequently adopted by this Court in *Washington v. Davis* and *Village of Arlington Heights.*[10] The Ninth Circuit holds that the plaintiff, unaided by any presumption of segregative intent from segregative effects, must prove racially discriminatory motivation for school authorities' actions causing racial separation before a court may find a constitutional violation. The District Court in the present case specifically relied upon the Ninth Circuit's standard in finding that the Constitution was not violated in the School District of Omaha (App. p. 44).

This Court has yet to address the question of the appropriate standard for determining segregative intent in the first instance in a school desegregation case. Nor, has it directly addressed the question of the propriety of using the foreseeable effects standard for determining discriminatory intent in other kinds of cases under the Fourteenth Amendment. Although it is patent that *Village of Arlington Heights* implies that such a standard is improper, apparently the courts of appeals are unwilling themselves to draw this conclusion. Therefore, this Court must act and resolve the conflicting interpretations of the Fourteenth Amendment in school desegregation cases.

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10. *Berkelman v. San Francisco Unified School District,* 501 F. 2d 1264 (9th Cir. 1974); *Johnson v. San Francisco Unified School District,* 500 F. 2d 349 (9th Cir. 1974); and *Soria v. Oxnard School District Board of Trustees,* 488 F. 2d 579 (9th Cir. 1973).

III. Orderly Judicial Administration of this Litigation Requires that the Issue of Intentional Segregation be Resolved Prior to the District Court's Reconsideration of the Remedy under Dayton Board of Education v. Brinkman, — U. S. —, 97 S. Ct. 2766 (1977).

In its June 29, 1977, opinion in this case, this Court also remanded for reconsideration of the question of the appropriate remedy in light of *Dayton Board of Education v. Brinkman.*

In its opinion on remand, the Court of Appeals specifically, and properly, refused to address the remedial questions raised by this Court's decision in *Dayton Board of Education v. Brinkman* and remanded these questions to the District Court. The critical principle in *Dayton Board of Education v. Brinkman* is that a remedy in a school desegregation case must be designed to redress the incremental segregative effect caused by violations of the Constitution. The remedy must be tailored to fit the wrong. Thus, it is inappropriate to address the question of the proper remedy until questions concerning the existence, if any, and scope of a constitutional violation are finally resolved in this case. Since, as argued above, the Court of Appeals continues to approve and apply a standard for determining intentional segregation which embodies an excessively expansive view of the scope of the violation and which is inconsistent with the law for determining constitutional violations specified in *Village of Arlington Heights,* orderly judicial administration of this litigation requires that this error of the Court of Appeals be corrected by this Court prior to any further review of the remedy.

CONCLUSION

As the Court reads these words, the School District of Omaha will be midway in its second school year under federal judicial supervision. The remedial mandates of the Court of Appeals have been implemented by the citizens of this school district in an orderly and responsible manner, but, at great cost, both in terms of the financial resources that have been diverted to areas other than education, and more importantly, in terms of the sacrifice of the people's right to govern themselves. Such costs may constitutionally be required of a school district only upon satisfactory factual proof of constitutional violations established by a reasoned statement of legal principles. *Dayton Board of Education v. Brinkman,* — U. S. at —, 97 S. Ct. at 2770. It is now apparent that the decree of the Court of Appeals lacks these constitutional prerequisites. Accordingly, this petition should be granted forthwith and the judgment of the Court of Appeals reversed.

Respectfully submitted,

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APPENDIX OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U. S. C. § 2000c-6:

> (a) Whenever the Attorney General receives a complaint in writing—
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> (1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, . . .
>
> . . .
>
> and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board . . . and after certifying that he is satisfied that such board . . . has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties

and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

42 U. S. C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.